BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA A. HANSER	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,417
SIRLOIN STOCKADE	)	
Respondent	)	
AND	)	
	)	
CRUM & FORSTER COMMERCIAL INSURANCE	)	
Insurance Carrier	)	

ORDER

The respondent and its insurance carrier appealed the Award dated June 12, 1998 entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on January 27, 1999.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for the claimant. Gary R. Terrill of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The ALJ found that claimant made a good faith effort to find appropriate employment after she recovered from her injuries and, when those efforts failed, she decided to pursue a college education. The ALJ found claimant had an 81.5 percent permanent partial general disability. The respondent and its insurance carrier appealed that decision and contend that claimant's benefits should be limited to the functional impairment rating because she has not made a good faith effort to find appropriate employment and she temporarily removed herself from the open labor market when she began taking classes. Furthermore, claimant retains the ability to earn a comparable wage because a full time job paying only the minimum wage would equal 90 percent or more of the average gross weekly wage that claimant was earning at the time of her injury. The

only issue before the Appeals Board on this appeal is the nature and extent of claimant's injury and disability. Specifically, whether claimant is entitled to a work disability award.

FINDINGS OF FACT

After considering the entire record, the Appeals Board finds as follows:

(1) The parties stipulated that claimant sustained personal injury by accident that arose out of and in the course of her employment with the respondent on September 3, 1996. On that date claimant injured her low back. The ALJ found this injury resulted in a 4 percent whole body functional impairment.

(2) The parties also stipulated that claimant's average weekly wage for this accident was $204.00.

(3) Claimant was released on January 9, 1997 by Dr. Dan E. Wilson, Jr., with permanent restrictions against repetitive bending and stooping and no lifting over 10 pounds frequently or 20 pounds occasionally. Similar restrictions were provided by Dr. Milo G. Sloo and Dr. Edward J. Prostic.

(4) Respondent was unable or unwilling to accommodate claimant's work restrictions. There is no evidence that the respondent's insurance carrier has offered any vocational rehabilitation services, including either training or job placement assistance, as allowed by the Workers Compensation Act.

(5) After determining she could not return to work with respondent, claimant applied for but did not receive unemployment compensation. She also began looking for other employment in the area where she lives. Being unable to do the more physical labor she once performed and being unable to find work within her medical restrictions, claimant began taking classes at Kansas State University to make herself more employable.

(6) Karen Terrill, respondent's vocational expert, testified that claimant had only made 7 or 8 job applications in a 14-month period. Ms. Terrill said this was inadequate and recommended at least 10 "applications" per week. She subsequently recommended 5 to 10 employer "contacts" a week. Ms. Terrill admitted that she did not have any information about how many contacts claimant made, only how many applications she made.

(7) Susan Mead, claimant's mother, testified she went to stay with claimant after claimant's injury. She testified to witnessing claimant searching the classified sections of newspapers and making telephone contacts. She estimated claimant made 8 to 10 calls a day until she started school. Thereafter, claimant continued with her job search efforts, but her calls were reduced to 2 to 5 a day.

(8) Claimant testified that she has continued with her job search efforts while in school and that if she were offered a job within her restrictions, she would accept the job.

(9) As a result of her work-related injuries, claimant has lost the ability to perform 63 percent of her former work tasks. That finding is based upon the opinion of Dr. Prostic.

(10) The Appeals Board adopts the ALJ's findings.

CONCLUSIONS OF LAW

The Award should be affirmed.

(1) Because hers is an "unscheduled" injury, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 1996 Supp. 44-510e:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The above statute, however, must be read in light of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer offered that paid a comparable wage. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(2) The ALJ found that claimant made a good faith effort to find appropriate employment and that she had not refused to work. Therefore, neither Foulk nor Copeland was appropriate to limit claimant's benefits to her functional impairment rating. The Appeals Board agrees. Claimant's medical restrictions severely restrict the number of jobs that she can perform. Although respondent argues a larger geographic area should have

been utilized, there is no evidence that claimant did not apply for any appropriate jobs that would have paid a comparable wage. Furthermore, under K.S.A. 44-510g, the insurance carrier had the opportunity to provide vocational rehabilitation and job placement assistance to claimant to assist her in obtaining employment but chose not to. When considering all the circumstances, claimant's decision to attend school to increase her vocational skills and increase her chances to find appropriate employment was reasonable and satisfies the good faith requirement set forth in Copeland.

(3) Averaging the 100 percent wage loss and the 63 percent task loss yields an 81.5 percent permanent partial general disability, which the ALJ found.

(4) The Appeals Board adopts the conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated June 12, 1998, entered by Administrative Law Judge Bryce D. Benedict should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Gary R. Terrill, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director